

Assessing Adults for Guardianship



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Goal

- Reduce unnecessary guardianships
- Improve quality and consistency

Rationale

- Guardianships increasing
- Definitions evolving
- Reform underway
 - Historically subjective
- Determination is difficult

Objectives

- Discuss ethical dimensions
- Distinguish capacity and competency
- Describe function
- Utilize 6 Pillar framework

Outline

- Activate learning
- Critical concepts
- Six Pillars
- Function
- Advocacy community
- Tools
- Stories ("Cases")

Take away messages

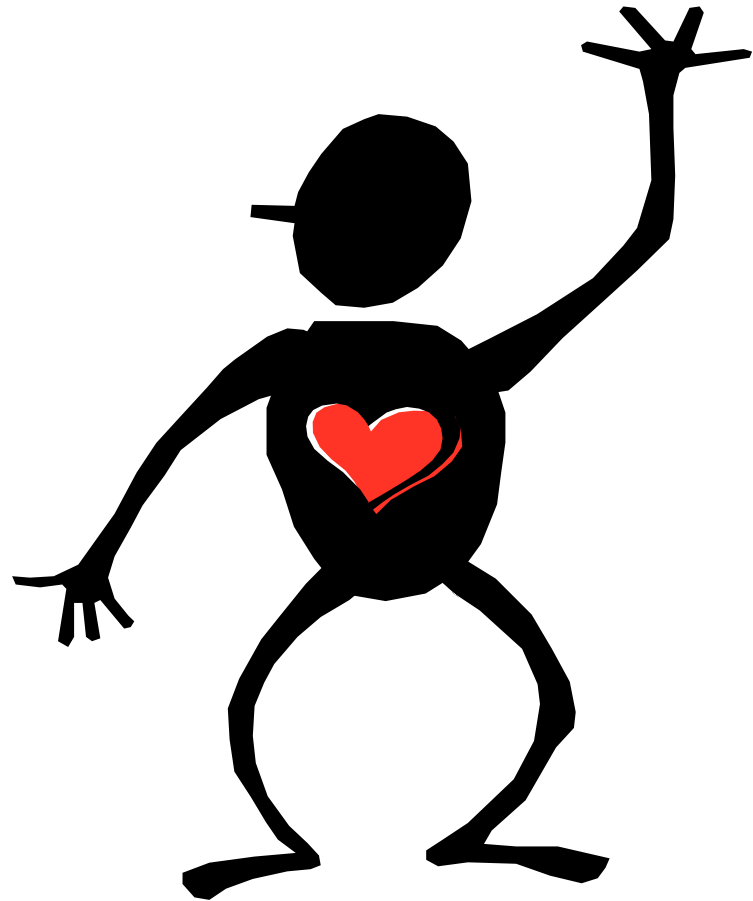
- Right to self-determination ≠ GOOD decisions
- Function > diagnosis
- Alternatives to guardianship
 - exist
 - are preferred
- Enhance autonomy, self-efficacy

Acknowledgements/Resources

You've come a long way.....

Activating Learning

- Adult learners
- Ways of knowing
- Ways of processing
- Ways of learning



What you bring

- You
- Personal history
- Personal concerns
- Knowledge
- Experience
- Bias and perceptions
 - of families
 - of aging
 - of mental illness
 - of substance abuse
 - of developmental disabilities
 - of traumatic brain injury

Critical Concepts

Common Language

Critical Concepts: Learning Circle

AUTONOMY, INDEPENDENCE, SELF-EFFICACY



Autonomy



- Right to privacy
- Right to be responsible
 - Dignity of risk and the right to fail
- Right to be left alone
- Right to choose

Legal doctrine

- constitution intended to protect

“a great many foolish, unreasonable and even absurd ideas which do not conform...” (Warren Burger)

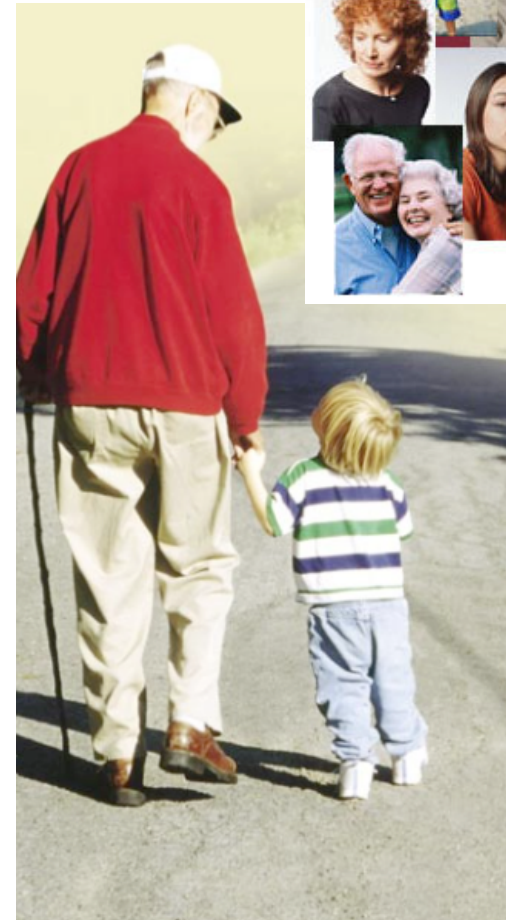
Independence

- I can do it myself
 - Self-sufficiency
 - Self-reliance
- Freedom
 - I can do it my way



Self-efficacy

- *Autonomy in action*
- “What I do makes a difference”
- “I’m in charge”
 - *And I get it done*
- “I am responsible”
 - for my actions



Limits to self-determination

- Not benign
- Complex motivations
- Ethical dilemmas

Words You Live By

A one minute reflective exercise

Ethical Principles

- Autonomy
- Non-maleficence
- Benevolence
- Social Justice

Competency v. Capacity

- Competency a legal concept
- Capacity a clinical concept
the ability to “do” something

Key concept

- Capacity is
 - Task specific, not global
 - Situational
 - Contextual
- Capacity can fluctuate
- Determining capacity can be **difficult**

Capacity

- **Primary elements**

- individual's awareness of environment
- ability to process information
- ability to make decisions
- ability to exercise adequate judgment

"Adequate judgment"

- What is proposed
- What are benefits
 - Of doing something
 - Of doing nothing
- What are risks
 - Of doing something
 - Of doing nothing
- What is the level of understanding
- Is it voluntary

Steps in Judicial Determination

- Screen cases
- **Gather information**
 - **Order, interpret, assess quality of report**
- Conduct hearing
- Make determination
- Ensure oversight

Role of Judges

- Balance well-being and rights
- Promote self-determination
- Identify less restrictive alternatives
- Guide guardians
- Determination of restoration
- Craft limited guardianship when appropriate

Why alternatives, limits

- Law requires it
- Encourages collaboration
- Maximizes autonomy
- Supports mental health

Screening

Gathering

Hearing

Determination

Oversight

Medical
Condition

Cognition

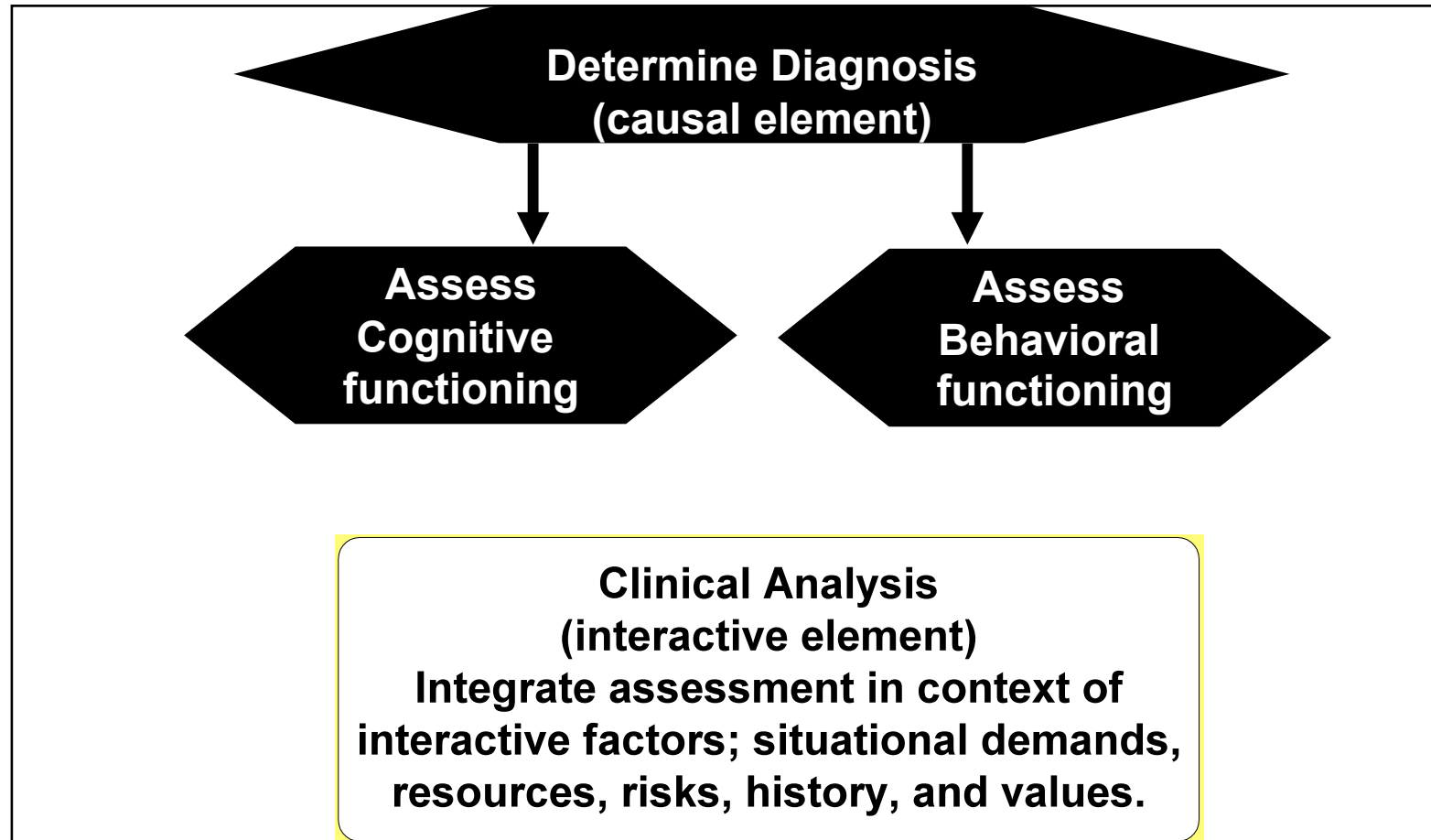
Everyday
Functioning

Values and
Preferences

Risk and
Level of
Supervision

Means to
Enhance
Capacity

Clinical Model



Six pillars

- Medical Condition
 - Does it produce functional disability
 - If so, how
 - Can it be reversed

Six pillars

- Cognitive Functioning
 - Able to receive, evaluate information
 - Make and communicate decisions
 - Alertness
 - Arousal
 - Reasoning ability
 - Visuospatial abilities
 - Insight

Six pillars

- Values and Preferences
- Risk and level of supervision
 - Alternatives
- Means to Enhance Capacity

Let's Break

Next Up:

Linda Learnard and the 3 Circles



Q and A

Model Clinical Report

Model Clinical Evaluation Report

State of	In the Probate Court of
County of	File No.
In the Matter of:	

1. PHYSICAL AND MENTAL CONDITIONS

A. List Physical Diagnoses:

Overall Physical Health: ☐ Excellent ☐ Good ☐ Fair ☐ Poor
Individual's Rating of Health: ☐ Excellent ☐ Good ☐ Fair ☐ Poor
Physical Health will likely: ☐ Improve ☐ Be stable ☐ Decline ☐ Uncertain

B. List Mental (DSM) Diagnoses:

Overall Mental Health: ☐ Excellent ☐ Good ☐ Fair ☐ Poor
Individual's Rating of Health: ☐ Excellent ☐ Good ☐ Fair ☐ Poor
Overall Mental Health will likely: ☐ Improve ☐ Be stable ☐ Decline ☐ Uncertain

Focusing on the diagnose(s) most impacting functioning and capacity, describe *relevant* history with examples of impact of symptoms on functioning and capacity

C. Current Medication

Individual manages medication independently or accepts necessary assistance/supervision ☐ Yes ☐ No ☐ Uncertain

Individual takes one or more medications that may impair mental functioning ☐ Yes ☐ No ☐ Uncertain

Explain:

D. Reversible Causes. Have temporary or reversible causes of mental impairment been evaluated and treated? (For example, acute illness, delirium) ☐ Yes ☐ No ☐ Uncertain

Explain:

E. Mitigating Factors. Are there mitigating factor that cause the person to appear incapacitated and could improve with time, treatment, or assistive devices? ☐ Yes ☐ No ☐ Uncertain

Explain:

Adapted from *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings* developed by the American Bar Association (ABA)/American Psychological Association (APA) Assessment of Capacity in Older Adults Work Project Working Group, copyright 2006, ABA and APA.

Clinician's ethical responsibility

- Mitigate burdens
 - Acknowledge strengths
 - Attend to sensory needs
 - Attend to person's 'timing'
- Maximize performance

Preliminary Assessment

Basic Considerations

- History is important
 - pay attention to changes over time
- Focus on decisional abilities
 - not cooperativeness or affability
- Beware of stereotypes
- Consider mitigating factors

What you need to report

- Medical cause of alleged incapacitation
 - How long has person been affected
 - Will it get worse, stay same or improve
 - Any mitigating factors

What you need to report

- Re decision-making and thinking
 - Nature and extent of impairments
 - Residual strengths
- What can person **do** as well as **not do**
 - self, financial, medical, civic, legal, home and community life
 - will person use adaptive assistance

What you need to report

- What makes life meaningful or good
- What factors are of greatest concern
- Are they consistent with values

What you need to report

- Basis of recommendations
 - Likelihood of risk of harm
 - Significance of risk of harm
- Enhancing autonomy
 - Treatment or accommodations that might enhance function, capacity
 - Person's willingness to accept

Alternatives to Full Guardianship

Least Restrictive Alternative:

Individual retains full independence and full decision-making power. No court involvement.

Community Resources/Unpaid Supports:

- Increased support from family and friends
- Statement of consent to keep parents involved
- Community agencies: e.g. AAA, Meals on Wheels
- DHHS programs and case workers

Money Management Strategies w/o court order:

- Representative payee
- Bill payment services
- Joint checking accounts

Other Alternatives:

- Mediation to help resolve a dispute

Middle Ground:

Individual retains some but not all control over decisions in their life. Limited court involvement.

Common Legal Arrangements:

- Living will
- Special needs trust
- Advance directive – mental health or medical
- Power of attorney – medical or financial

Limited or Temporary Guardianship:

- Limited or temporary medical guardianship
- Limited or temporary residential guardianship
- Limited guardianship can be tailored to address an individual's needs based on what is requested in court.

Most Restrictive Alternative:

A guardian has full decision-making control over all areas of an individual's life. Requires a court order.

Most Restrictive Alternative:

- Conservatorship: Limited, temporary, or full

Full Guardianship

Common omissions

- Relationship of symptoms to function
- Health Conditions
 - Reversibility
 - Mitigating factors
 - Med side effects
- If you don't know...Ask

Common omissions

- Cognitive function
 - Level of consciousness
 - Fluctuations
 - Decision-making ability
 - Understand
 - Reason
 - Appreciate
 - Choose

Common omissions

- Everyday function
- Values and Preferences
- Risk of Harm
- Alternatives
- Treatment and Housing
- Attendance
- Medication list with doses

Questions beyond today?

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Or visit my website:

<http://susanwehrymd.com>

On-line resources

- <http://www.maine.gov/guardianship>
- <http://www.ncpj.org>
- <http://www.abanet.org/aging>